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In the Supreme Court of the United States

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OCTOBER TERM, 1906

No. 41

CATHERINE SCHLEMMER, Plaintiff in Error,

vs.

THE BUFFALO, ROCHESTER AND PITTSBURGH RAILWAY COMPANY

In error to the Supreme Court of the State of Pennsylvania

PAPER BOOK OF DEFENDANT IN ERROR

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Pages.

No Federal Question Involved, ... 1-16

The State Court having decided the Case upon the Ground of Contributory Negligence, which does not present a Federal Question, its Judgment would not be reviewable here even though another Issue, presenting a Federal Question, had been squarely raised, ... 16-19

Assumption of Risk and Contributory Negligence are separate and distinct Defenses. The Act of 1893 relates to the former only. It does not take away the latter, ... 20-40

The Interstate Commerce Commission correctly interpreting the Act of 1893, notified the Railway Employees that Section 8 would not release them from Responsibility for their own Contributory Negligence, ... 40-40

The Doctrine of Contributory Negligence was correctly applied by the Pennsylvania Courts in this Case, ... 40-42

The Steam Shovel was not a "Car Used in Moving Interstate Traffic," 42-47

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BRIEF OF ARGUMENT OF DEFENDANT IN ERROR SUR MOTION TO DISMISS, AND UPON THE MAIN QUESTION.

No Federal Question Involved.

The plaintiff in error sued in the courts of Pennsylvania for damages for the death of her husband, Adam M.

Schlemmer, claiming the same to have resulted from the negligence of defendant in error. The law of Pennsylvania applicable to the case (Act of May 25, 1887, Laws of Pennsylvania, p. 271) requires that the Plaintiff's declaration in an action such as this "shall consist of a concise statement of the Plaintiff's demand." The statement filed by her appears at page 3 of the record and contains various allegations, as that her husband "was killed by reason of defendant's negligence" and "lost his life by reason of defendant's carelessness as shown by the following facts and circumstances" therein detailed. It raises no federal question whatever unless the same may be said to be raised in the language—

"Said coupler was not a legal coupler or coupling as required by existing laws on date—decedent's death viz. on August 5, A. D. 1900. Defendant was transporting said shovel car from Limestone in the State of New York through the State of Pennsylvania."

Whether the "existing laws" referred to were state, or federal laws, was not declared. No legal proposition was in said statement based upon the fact that "said coupler was not a legal coupler." No Act of Congress was mentioned or referred to, and no title, right, privilege or immunity claimed, under any statute of the United States. But the statement concludes that "on account of defendant's negligence and carelessness as aforesaid in causing the death of her said husband" the action was brought.

In the report of testimony the following occurs (Record, p. 16-17):

"Q. Mr. Coates, what kind of a coupling was that? Was it a safe coupling or a dangerous coupling, or what was it?

"A. It would just be according to how a man would go at to make the coupling.

"Q. How?

"A. It would just be according to how a man would go at to make the coupling. It would be dangerous in one way, and in another it would not.

"Q. Would you say as good as a safety coupler?

"A. Oh, no; no, sir.

"By Mr. Gordon: We object to that, and ask that it be stricken out.

"By the Court: They do not have to furnish the best appliances. They may furnish something that is reasonably safe.

"By Mr. Truitt: *We will come to this question that under the United States Statute they are required to furnish a safety coupler.*

"By the Court: I think it is not a question of comparison with a safety coupler.

"Q. Well, was it a safe coupler?

"A. No; it was not just exactly a safe coupling.

"Q. Wasn't it, Mr. Coates, a very dangerous coupling?

"A. Well, it was just according, I say, as how a man would go to make the coupling. I have made many such couplings myself, and I have seen a good many."

Surely that observation of counsel in the midst of the examination of a witness did not set up or claim any title, right, privilege or immunity under any statute. It did not even mention any particular statute, and even had counsel done so at that point and in that manner it would not have been a proper place or method of setting up and presenting to the court, for its determination, a Federal question.

At a later stage in the taking of testimony, as appears on page 53 of the Record, the following occurred:

"By Mr. Truitt: Plaintiff offers especially in this case the Statute of the United States relating to safety couplers. It was approved March 2nd, 1893, by the 52nd Congress, second session, chapter 196; and appears in the United States revised statutes, or Statutes at Large, Volume 27, page 532. *We plead this especially as part of the law in the case.*"

Again, that was not a proper time, place or method of setting up a Federal question. The mere offering of an Act of Congress in evidence and verbal statement of counsel that it is then and there pleaded "especially as part of the law in the case," amounted to nothing. The proper place to raise the question, in the first instance, was in plaintiff's statement. Even had that statement contained the language embodied in this offer of evidence, it would not have amounted to the raising of a Federal question within Section 709 of the Revised Statutes of the United States. The Act of 1893, which was thus offered in evidence, comprises eight sections upon different subjects. The mere statement that it is pleaded "especially as part of the law in the case" does not amount to a special claim of any particular title, right, privilege or immunity under the Act or any part of it, for no such title, right, privilege or immunity was mentioned at all, and no particular part or provision of the statute was mentioned or referred to as having any bearing whatever upon the case.

Upon the conclusion of plaintiff's testimony defendant moved for a compulsory non-suit upon the following grounds (Record, p. 53):

"First: That there is no proof of any negligence on the part of the defendant in this cause.

"Second: That the evidence upon behalf of plaintiff proves conclusively that the accident happened because the deceased failed to keep his head at least as low as the floor of the steam-shovel. That this omission was the fault of the deceased exclusively; and that deceased was guilty of contributory negligence and there can be no recovery in this case.

"Third: That under all the evidence in this case the verdict must be for the defendant."

Whereupon the court made the following order—

"By the Court: The motion of the defendant for a compulsory non-suit is sustained, and a non-suit is entered; with leave to the plaintiff within four days to make a motion to take it off."—(Record, p. 54.)

Plaintiff's counsel thereupon moved to take off the compulsory non-suit for the following reasons (Record, p. 9)—

"First. The Court erred in directing the Jury to render a verdict for the defendant.

"Second. The Court erred in ruling as a matter of law that the plaintiff was not entitled to recover in this case.

"Third. That the evidence showed that the decedent, Adam M. Schlemmer, was not negligent, and used all the care demanded by the circumstances.

"Fourth. That under the United States Statutes specially pleaded in this case, that the decedent was not deemed to have assumed the risk owing to the fact that the car was not equipped with an automatic coupler.

"Fifth. The evidence showed that the defendant company violated the law, and was, therefore, guilty of negligence and caused decedent's death.

"Sixth. That the evidence showed that the coupling which the decedent attempted to make was complicated, difficult and dangerous, and defendant company had neglected to instruct decedent as well as inform him of the nature thereof.

"Seventh. That the evidence disclosed that the car coupling in this case was out of date, more dangerous than the old link and pin coupling, and not a reasonably safe appliance.

"Eighth. That the evidence showed that the decedent attempted to make coupling with lantern lighted, and that it was a question for the Jury to determine whether decedent used ordinary care.

"Ninth. That the evidence of the experts showed that the shovel car in this case was the first car of this kind handled by them in many years of experience, that it had an unusual coupling, that it had no deadheads or bumpers

thereon, and that the defendant company accepting such a car thus equipped was guilty of negligence *per se.*"

(Note. These reasons, particularly the fourth and ninth, are not accurately quoted in the paper book of plaintiff in error.)

These reasons cannot be said to distinctly raise any particular federal question unless it was that under the U. S. Statutes referred to, but not mentioned in the fourth reason, "decedent was not deemed to have assumed the risk," owing to the fact that the car was not equipped with an automatic coupler. But the assumption of the risk was not one of the grounds defendant had asked for, and upon which the trial judge had granted, the compulsory non-suit. In his opinion refusing the motion to take off the non-suit the trial judge said (Record, p. 11)—

"The evidence showed that plaintiff's decedent, who was shown to have been a competent man in the position of brakeman, which he occupied and in which he had had considerable experience, attempted to make a coupling, which was shown not to have been complicated or difficult to understand, and of which said decedent undoubtedly had a thorough knowledge and comprehension, between one of the defendant's cars and a steam shovel or construction car, which was being conveyed by defendant company, for some private parties, from a point in the State of New York to one in this Commonwealth; that plaintiff's decedent, who could evidently see, and understand the said coupling as attached to the steam shovel, had his attention called thereto, and was directed as to his position in making use thereof twice by the conductor of his own train and of the switching engine crew, and within a very few minutes of the accident; and that in making said coupling, decedent, contrary to the instruction, immediately prior thereto given, raised his head too much, and because of that, as well as because of the irregularity or unevenness of the heights of the respective car and steam shovel, and

the absence of bumpers or deadwoods that would properly operate for the purpose of preventing that which actually happened, the decedent's head was crushed, resulting in his almost immediate death.

"The plaintiff's statement declares that the coupling of the steam shovel was exceedingly complicated and dangerous, and that decedent was not warned of said unusual and dangerous appliance, and by reason thereof the accident happened which resulted in the death of decedent.

"Plaintiff's testimony not only fails to sustain these charges but quite negatives them.

"That the coupling arrangement was not complicated was made very apparent by the testimony; that decedent was warned as to the danger and directed as to the manner of operation was conclusively proven; and that he attempted the act of making the coupling with a full knowledge of the danger seems to be beyond controversy. A citation of authorities is not necessary to show that the defendant company is not to be held for negligence because of the fact that it has undertaken to convey a steam shovel, equipped with a means of coupling which is not of the latest device, or even if it were dangerous, where the brakeman understood or was made aware of the difficulty or danger to be guarded against; nor if the injury was caused by the fault of the employee in taking unnecessary risks, or in failing to heed warnings or instructions, especially when given by his superiors whose duty it is to do so; nor by voluntarily placing himself unnecessarily in a dangerous position whereby he is injured."

The findings of the trial judge were manifestly justified by the evidence: thus, Mr. Coates, the yard conductor, plaintiff's first witness, said—

"I was there, and I seen he was too high. I seen what kind of a coupling it would be in that shape, and I told him to keep down.

"By Mr. Gordon:

"You told Mr. Schlemmer to keep down?

"A. I told Mr. Schlemmer to keep down. He had got down, but raised his head up, and I hollowed again." (Record, p. 17.)

And again—

"What caused this accident? What happened when he went to couple there?

"A. Well, he got his head too high."—(Record, p. 18.)

And again—

"Well, I have often seen cars a good bit that way, that a man had to keep down in under a car in order to make a coupling. I have often run across big cars that way that had bumpers on them, that were broken off in that same way. A man has to watch that, you know."—(Record, p. 19.)

And again—

"Q. And it was equipped with a single-pocket drawhead, was it?

"A. Yes, sir.

"Q. That was about the commonest coupler known prior to the introduction of the automatic, wasn't it?

"A. Yes, sir.

"Q. And it is very simple, isn't it?

"A. Yes, sir, it is.

"Q. And in order to couple the drawbar to this drawhead all that was necessary was to lift out the coupling pin, insert the end of the drawbar into the pocket, and drop the pin in?

"A. You would have to raise the draw-bar—

"Q. I mean in coupling the drawbar to the steam shovel?

"A. The drawbar stayed right in the drawhead, you know.

"Q. It was already coupled to the steam shovel?

"A. Yes, sir.

"Q. And that is all that was necessary to do in order to couple to the steam shovel?

"A. That was all; yes, sir.

"Q. Did it require any instructions to tell Mr. Schlemmer how to make this coupling; that is, did he know how to make the coupling?

"A. He knows how to make a coupling, I guess.

"Q. That is, he has had enough experience to know.

"A. Yes, sir, he has had experience enough to know.

"Q. All that was necessary to make the coupling to the caboose was to guide the free end of the drawbar into the slot in the knuckle?

"A. Yes, sir.

"Q. And Mr. Neilson had set the pin for him?

"A. Yes, sir, he had set the pin.

"Q. And there was nothing complicated about it?

"A. No.

"Q. The only danger that there was was that that would occur if he lifted his head too high?

"A. Yes, sir.

"Q. You say you notified him twice to keep down?

"A. Yes, sir.

"Q. Did he obey that word?

"A. He got down once, and then he got his head up too high again; and I hollowed at him, and it was too late.

"Q. If he had obeyed your instructions, Mr. Coates, this accident could not have happened could it?

"A. No, I do not suppose it would; it could not."—(Record, pp. 21-22.)

Mr. Schlemmer was an experienced brakeman and ordinary care on his part would have prevented the accident. (Record, pp. 29-30.)

Mr. Nielson, the freight conductor, who had charge of the train and of the crew, including Schlemmer, testified as follows (Record, p. 40):—

"Well we backed down within about three or four feet of the caboose, and Mr. Schlemmer said that he would enter this drawbar in that and drop the pin, and I told him I would set the pin and it would drop itself. I went in

and got the pin and set it, and I told him, when he went down under the car to take hold of this bar, to be sure and stay down low, so if he missed the coupling he would be in the clear so it would not catch him."

He testified that it was not a dangerous coupling to make. The following also appears in the testimony of this witness (Record, p. 45):

"Q. The coupling apparatus on the shovel car was the simplest kind known, wasn't it?
"A. Yes, sir.
"Q. And such as was familiar to every brakeman?
"A. Yes, sir.
"Q. There was nothing which required any instructions in making this coupling, except to keep down, was there?
"A. That was all.
"Q. Mr. Schlemmer knew how to make it, did he?
"A. Yes, sir.
"Q. You say that you warned him just before the coupling was made to keep down, to keep his head down, so if he missed the coupling he would miss the cars and not be pinched?
"A. Yes, sir.
"Q. Had he regarded your instructions would he have been injured?
"A. No, sir.
"Q. Then it was the disregard of the instruction given him by you that resulted in his death?
"A. Yes, sir.
"Q. How did the train come up, Mr. Neilson?
"A. It come back very easily.
"Q. Did it move the caboose at all?
"A. No, sir.
"Q. Who made the coupling afterward on this steam shovel?
"A. I did.
"Q. Did you have any difficulty with it?
"A. No, sir."

And again (p. 45)—

"If he had followed the instructions he would not have been hurt."

And again (p. 46)—

"Q. But it was the raising up in violation of your orders that caused his death, wasn't it?
"A. Yes, sir."

The trial judge having refused the motion to strike off the compulsory non-suit, upon request of plaintiff's counsel, made this entry—

"Plaintiff by her attorneys excepts to the refusal of the Court to set aside the non-suit in this case, and at their request a bill of exceptions is sealed as of July 21, 1902."

This was a general exception raising no federal question. Plaintiff thereupon appealed to the Supreme Court of Pennsylvania, and assigned the following errors (Record, p. 59) —

"I. The Court erred in refusing to set aside the non-suit in this case.
"II. The Court erred in not submitting the question of contributory negligence to the jury.
"III. The Court erred in holding that 'The shovel car was not a car used in interstate commerce or any other kind of traffic.'
"IV. The Court erred in holding that 'Plaintiff's decedent was guilty of negligence that contributed to his death.'
"V. The Court erred in holding that 'Contributory negligence will bar a recovery for an injury inflicted by defendant's negligence, which is the result of a failure to comply with statutory requirements."

These assignments of error constituted the pleadings upon

which the cause was heard in the Supreme Court of Pennsylvania.

"The assignments of error are an essential part of the pleadings in the Supreme Court, and as such should be so complete in themselves as not to require reference to the other parts of the record. Each specification should in and of itself present the question the Court is called upon to decide." *Landis* vs. *Evans, 113 Pa. 332.*

And see *Cessna's Estate, 192 Pa. 14; Irvin* vs. *Kutruff et al., 152 Pa. 609; Bull's Appeal, 24 Pa. 286.*

The assignments of error above quoted raise no Federal question whatever. They do not "specially set up or claim" any "title, right, privilege or immunity" under any Act of Congress. They do not even refer to any Act of Congress. The Act of Congress of 1893 was mentioned in the argument of the case, but the Supreme Court of Pennsylvania very properly refused to consider it upon the ground that no such question had been raised in the pleadings. The case was disposed of in a *per curiam* opinion, which, in its entirety, reads as follows (Record, p. 56):

"Whether the Act of Congress of March 2, 1893, (27 U. S. Stat. at Large 531) in regard to the use of automatic couplings on cars employed in interstate commerce, has any applicability at all in actions for negligence in the courts of Pennsylvania, is a *question that does not arise in this case,* and we therefore express no opinion upon it. The learned judge below sustained the non-suit on the ground of the deceased's contributory negligence and the judgment is affirmed on his opinion on that subject."

In *Sayward* vs. *Denny,* 158 U. S. 180, on page 183, Mr. Chief Justice Fuller said:

"As the validity of no treaty or statute of, or authority exercised under, the United States, nor of a statute of, or authority exercised under, any State, was drawn in ques-

tion, it is essential to the maintenance of our jurisdiction that it should appear that some title, right, privilege, or immunity under the Constitution or laws of the United States was specially set up or claimed in the state court, and that the decision of the highest court of the State, in which such decision could be had, was against the title, right, privilege or immunity so set up or claimed. And in that regard, certain propositions must be regarded as settled. 1. That the certificate of the presiding judge of the state court, as to the existence of grounds upon which our interposition might be successfully invoked, while always regarded with respect, cannot confer jurisdiction upon this court to reexamine the judgment below. *Powell* v. *Brunswick County*, 150 U. S. 433, 439, and cases cited. 2. That the title, right, privilege or immunity must be specially set up or claimed at the proper time and in the proper way. *Miller* v. *Texas*, 153 U. S. 535; *Morrison* v. *Watson*, 154 U. S. 111, 115, and cases cited. 3. That such claim cannot be recognized as properly made when made for the first time in a petition for rehearing after judgment. *Loeber* v. *Schroeder*, 149 U. S. 580, 585, and cases cited. 4. That the petition for the writ of error forms no part of the record upon which action is taken here. *Butler* v. *Gage*, 138 U. S. 52, and cases cited. 5. Nor do the arguments of counsel, though the opinions of the state courts are now made such by rule. *Gibson* v. *Chauteau*, 8 Wall. 314; *Parmelee* v. *Lawrence*, 11 Wall. 36; *Gross* v. *U. S. Mortgage Co.* 108 U. S. 477, 484; *United States* v. *Taylor*, 147 U. S. 695, 700. 6. The right on which the party relies must have been called to the attention of the court, in some proper way, and the decision of the court must have been against the right claimed. *Hoyt* v. *Sheldon*, 1 Black, 518; *Maxwell* v. *Newbold*, 18 How. 511, 515. 7. Or, at all events, it must appear from the record, by clear and necessary intendment, that the Federal question was directly involved so that the state court could not have given judgment without deciding it; that is, a definite issue as to the possession of the right must be distinctly deducible from the record before the state court can be

held to have disposed of such Federal question by its decision. *Powell* v. *Brunswick County*, 150 U. S. 400, 433."

In *Ansbro* v. *United States*, 159 U. S. 695, on page 697, Mr. Chief Justice Fuller said:

"The jurisdiction of this court must be maintained then, if at all, on the ground that this is a case 'that involves the construction or application of the Constitution of the United States,' or 'in which the constitutionality of any law of the United States is drawn in question.' But we cannot find that any constitutional question was raised at the trial. Motions to quash, to instruct the jury to find for the defendant, for new trial, and in arrest of judgment were made, but in neither of them, so far as appears, nor by any exception to rulings on the admission or exclusion of evidence, nor to instructions given or the refusal of instructions asked, was any suggestion made that defendant was being denied any constitutional right or that the law under which he was indicted was unconstitutional. The first time that anything appears upon that subject is in the assignment of errors, filed February 13, 1895.

"A case may be said to involve the construction or application of the Constitution of the United States when a title, right, privilege, or immunity is claimed under that instrument, but a definite issue in respect of the possession of the right must be distinctly deducible from the record before the judgment of the court below can be revised on the ground of error in the disposal of such a claim by its decision. And it is only when the constitutionality of a law of the United States is drawn in question, not incidentally but necessarily and directly, that our jurisdiction can be invoked for that reason. *Borgmeyer* v. *Idler*, 159 U. S. 408; *Carey* v. *Railway Company*, 150 U. S. 170; *In re Lennon*, 150 U. S. 395; *Northern Pacific Railroad Company* v. *Amato*, 144 U. S. 465, 472; *Sayward* v. *Denny*, 158 U. S. 180. An assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised in the court below and

rulings asked thereon, so as to give jurisdiction to this court under the fifth section of the act of March 3, 1891."

See also *Murdock* v. *City of Memphis*, 20 Wall. 590; *Detroit Railway Co.* v. *Guthard*, 114 U. S. 133; *Oxley Stave Co.* v. *Butler County*, 166 U. S. 648; *Mutual Life Insurance Co.* v. *McGrew*, 188 U. S. 291; *Loeb v. Trustees*, 179 U. S. 472.

It is already shown that plaintiff's statement filed in the trial court made no reference whatever to any federal statute or question and that was the place where, under the laws of Pennsylvania, its right, if it claimed any, should first have been set up.

In offering the act of March 2, 1893, in evidence and saying—"we plead this especially as part of the law in the case" (Record, p. 53), which was the first and only mention of any federal statute in the trial court, plaintiff's counsel certainly did not especially set up or claim any particular "title, right, privilege or immunity" under that statute. No right, title, privilege or immunity whatever was specified. The nine reasons for taking off the compulsory non-suit (Record, p. 9) are equally defective. But even if the offer of the statute in evidence and a general reference to the U. S. statute contained in one of the nine reasons for striking off the compulsory non-suit, be considered as setting up any distinct or definite right, that right was waived when on appeal to the Supreme Court of Pennsylvania, the errors assigned for the consideration of that court (Record, p. 59) omitted all reference to any federal statute or any federal question.

No federal question having been submitted to the Court of last resort of Pennsylvania that court properly held that any question with reference to the act of March 2,

1893, "is a question that does not arise in this case," and its decision sustaining the compulsory non-suit ordered by the trial judge on the ground of the contributory negligence of the deceased, is not reviewable in this court.

THE STATE COURT HAVING DECIDED THE CASE UPON THE GROUND OF CONTRIBUTORY NEGLIGENCE, WHICH DOES NOT PRESENT A FEDERAL QUESTION, ITS JUDGMENT WOULD NOT BE REVIEWABLE HERE EVEN THOUGH ANOTHER ISSUE, PRESENTING A FEDERAL QUESTION, HAD BEEN SQUARELY RAISED.

Even though a federal question had been squarely raised in the Supreme Court of Pennsylvania, nevertheless, as the defence of contributory negligence was found by that court to be a complete defence, it would have been unnecessary for it to pass upon the federal question and its failure to do so could not have been assigned as error here.

In *Adams County* v. *Burlington & Missouri R. R. Co.*, 112 U. S. 123, this court distinctly laid down the law which is thus stated in the syllabus:

"When a record shows that two questions are presented by the pleadings, one federal and one non-federal, and that the judgment below rested upon a decision of the non-federal question, this court has no jurisdiction to review that judgment."

To the same effect are *Chouteau & Another* v. *Gibson*, 111 U. S. 200; *Murdock* v. *Memphis*, 20 Wall. 590, 636.

In *Jenkins* v. *Loewenthal*, 110 U. S. 222, the law is thus stated in the syllabus:

"When the record discloses two defences to an action brought in a State court, one presenting a federal question, and one presenting no federal question, either of

which if sustained was a complete defence to the suit, and that the State court gave judgment in favor of the defendant on both, and the cause is brought here by writ of error, this court will affirm the judgment below without considering the federal questions."

In *Hale* v. *Akers, 132 U. S. 554*, it was held that where the Supreme court of a State decides a federal question, in rendering a judgment, and also decides against the plaintiff in error on an independent ground not involving a federal question, and broad enough to maintain the judgment, the writ of error will be dismissed, without considering the federal question. On page 564, Mr. Justice Blatchford said:

"After contending that the court below erred in its decision of the Federal question; that such decision was based upon the facts (1) that the land in dispute was a portion of the pueblo land, and (2) that the lines of the survey of the Huichica grant did not conform to the decree of confirmation; and that, in so doing, the court ignored (1) the power of the Mexican government to divest the pueblo title, and (2) the findings of the lower court that the survey did conform to the decree; the plaintiffs urge that the interpretation by that court of the agreement between Schell and Akers was incorrect, and that it would not have so interpreted the agreement had it not been for its erroneous deduction of law regarding the Federal question, and, therefore, that the decision of the Federal question was the controlling decision of the case.

"But we cannot take this view. Both of the courts below decided that, irrespective of the Federal question, the agreement of October 11, 1860, was decisive of the case. The construction of that agreement involved no Federal question, and controlled the whole case.

"In *Murdock* v. *City of Memphis,* 20 Wall. 590, 636, this court announced, as one of the propositions which flowed from the provisions of the second section of the act

of February 5, 1867, 14 Stat. 386, embodied in section 709 of the Revised Statutes of 1874, and still in force, that even assuming that a Federal question was erroneously decided against the plaintiff in error, the court must further inquire whether there was any other matter or issue adjudged by the state court, which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by the Federal question; and that, if that is found to be the case, the judgment must be affirmed, without inquiring into the soundness of the decision on such other matter or issue.

"This principle has since been repeatedly applied. In *Jenkins* v. *Lowenthal,* 110 U. S. 222, where two defences were made in the state court, either of which, if sustained, barred the action, and one involved a Federal question and the other did not, and the state court in its decree sustained them both, this court said that, as the finding by the state court of the fact which sustained the defence which did not involve a Federal question was broad enough to maintain the decree, even though the Federal question was wrongly decided, it would affirm the decree, without considering the Federal question or expressing any opinion upon it, and that such practice was sustained by the case of *Murdoch* v. *City of Memphis, supra.* See, also, *McManus* v. *O'Sullivan,* 91 U. S. 578; *Brown* v. *Atwell,* 92 U. S. 327; *Citizens' Bank* v. *Board of Liquidation,* 98 U. S. 140; *Chouteau* v. *Gibson,* 111 U. S. 200; *Adams County* v. *Burlington & Missouri Railroad,* 112 U. S. 123; *Detroit City Railway* v. *Guthard,* 114 U. S. 133; *New Orleans Water Works Co.* v. *Louisiana Sugar Refining Co.,* 125 U. S. 18; *De Saussure* v. *Gaillard,* 127 U. S. 216, 234.

"It appears clearly from the opinion of the Supreme Court that it was not necessary to the judgment it gave that the words 'taking the direction of the Arroyo Seco' should be construed at all. It is, therefore, of no consequence whether or not that court was wrong in its conclusions as to the meaning of the Huichica grant."

See *Detroit Railway Co.* v. *Guthard,* 114 U. S. 133;

N. O. Waterworks v. *La. Sugar Company,* 125 U. S. 18; *De Saussure* v. *Gaillard,* 127 U. S. 216-233.

In *Eustis* v. *Bolles,* 150 U. S. 361-366, Mr. Justice Shiras, delivering the opinion of the court, said—

"It is likewise settled law that, where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment."

In *Rutland Railroad* v. *Central Vermont Railroad,* 159 U. S. 630, on page 640, Mr. Justice Gray said:

"It is well settled, by a long series of decisions of this court, that where the highest court of a State, in rendering judgment, decides a Federal question, and also decides against the plaintiff in error upon an independent ground, not involving a Federal question, and broad enough to support the judgment, the writ of error will be dismissed, without considering the Federal question."

In *Israel* v. *Arthur,* 152 U. S. 355, the Supreme Court held that it had no jurisdiction to revise the decision of the highest court of a state, in an action at law, upon a pure question of fact, although a Federal question might arise if the question of fact were decided in a particular way.

The trial judge having declared that upon plaintiff's own evidence she was not entitled to recover because of the contributory negligence of the deceased; and the Supreme Court of Pennsylvania having affirmed the judgment upon that ground alone, there is nothing to which the jurisdiction of this court can attach.

ASSUMPTION OF RISK AND CONTRIBUTORY NEGLIGENCE ARE SEPARATE AND DISTINCT DEFENSES—THE ACT OF 1893 RELATES TO THE FORMER ONLY—IT DOES NOT TAKE AWAY THE LATTER.

The 8th section of the Act of Congress of March 2, 1893, (27 Stat. L., 531) declares

"That any employe of any such common carrier who may be injured by any locomotive, car or train in use contrary to the provisions of this act, *shall not be deemed thereby to have assumed the risk* thereby occasioned, although taken in the employment of such carrier after the unlawful use of such locomotive, car or train had been brought to his knowledge."

Under the law of Pennsylvania, plaintiff would not be entitled to recover in this case even if the deceased had not been guilty of contributory negligence, because it is the well settled law of that State that an employe assumes the risks incident to the discharge of his duties, even though those duties are hazardous, if he has had an opportunity to ascertain their dangerous character. *Patterson* vs. *R. R. Co., 76 Pa. 389; Pgh. & Connellsville R. R. Co.* vs. *Sentmeyer, 92 Pa. 276.*

In the latter case Gordon, J., delivering the opinion, said (p. 280):

"The servant, or employe, assumes the risk of all dangers, however they may arise, against which he may protect himself by the exercise of ordinary observation and care. Furthermore, the master's liability arises from the fact that he subjects his servant to dangers which in good faith he ought to provide against, but he is not responsible for those dangers to which the servant voluntarily subjects himself, though he does so without carelessness or breach of duty."

To the same effect are *Moore* vs. *Penna. R. R. Co., 167 Pa. 495-497; Auburn* vs. *Tube Works Co., 14 Superior*

Court, 568-570; Rooney vs. *Carson, 161 Pa. 26-27; Bemisch* vs. *Roberts, 143 Pa. 1.*

If the Act of 1893 applied to this case at all, it simply took away from defendant that single ground of defence, namely, the assumption of risk by the employe. But the Act in no way interferes with, touches or relates to, the defence of contributory negligence. That is left precisely as it was before the Act of 1893 was passed.

If an employee of a common carrier should place his neck upon the track in front of a moving train and thereby lose his life, would the Act of 1893 permit or authorize a recovery, upon proof that the train, or locomotive, or car, which cut off his head was not equipped with automatic couplers? If contributory negligence would be a bar to recovery in that extreme case, then in what case of clear contributory negligence would it not be a bar? Defendant was successful in the State courts, not upon the defence of assumption of risk, by the deceased, but upon the ground of contributory negligence. Plaintiff's counsel confuses these two grounds of defence, which are separate and distinct, not related to, nor dependent upon, each other.

It is a rule of universal application, sustained by hundreds of decisions, that recovery by a plaintiff is precluded where his or her own negligence has proximately contributed to his or her own injury. It is sufficient to refer to *Washington & Georgetown R. R. Co.* vs. *McDade, 135 U. S., 554; 7 Am. & Enc. of Law, 371, Sunney* vs. *Holt, 15 Fed. Rep., 880; Motey* vs. *Pickle M. & G. Co., 74 Fed. Rep., 155.*

Although under the Act of 1893, where applicable, an employe will not be deemed to have assumed the risk of the employment, nevertheless he must act in such manner that injury shall not befall him as the result of his own fault or imprudence. The distinction between "assumption of risk"

and "contributory negligence" has always been clearly drawn.

In *Union Pacific Ry. Co.* vs. *O'Brien 161 U. S., 451-456,* Chief Justice Fuller, delivering the opinion of this court said:

"That the second instruction was properly refused because it confused two distinct propositions, that relating to the risks assumed by an employe in entering a given service and that relating to the amount of vigilance that should be exercised under given circumstances."

In *Choctaw, Oklahoma R. R. Co.* vs. *McDade, 191 U. S., 64,* Mr. Justice Day, delivering the opinion of this court, said:

"The question of assumption of risk is quite apart from that of contributory negligence."

In *Narramore* vs. *Cleveland C. C. & St. L. Ry. Co. (C. C. A., Sixth Circuit), 96 Fed. Rep. 298-304,* these two grounds of defence were considered and discussed by Taft, Circuit Judge, who said:

"The Knisely case, which, in our judgment, was wrongly decided, and many others in which a right conclusion was reached, seem to us to confuse an agreement to assume the risk of an employment, as it is known to be to the servant, and his contributory negligence. That, under certain circumstances, the one sometimes comes very near the other, and cannot easily be distinguished from the other, may be conceded; but in most cases there is a broad line of distinction, and it is so in this case. For years employees worked in railroad yards in which blocks were not used, and yet no one would charge them with negligence in so doing. The switches and rails were mere perils of the employment. Assumption of risk is in such cases the acquiescence of an ordinarily prudent man in a known danger, the risk of which he assumes by contract. Contributory negligence in such cases is that action or non-action in disregard of personal

safety by one who treating the known danger as a condition, acts with respect to it without due care of its consequences."

Again, on the same page:

"Assumption of risk and contributory negligence approximate where the danger is so obvious and imminent that no ordinarily prudent man would assume the risk of injury therefrom. But where the danger, though present and appreciated, is one which many men are in the habit of assuming, and which prudent men who must earn a living are willing to assume for extra compensation, one who assumes the risk cannot be said to be guilty of contributory negligence if, having in view the risk of danger assumed, he uses care reasonably commensurate with the risk to avoid injurious consequences."

In *St. Louis Cordage Co.* vs. *Miller,* 126 Fed. Rep., 495, (C. C. A. 8th Circuit), Circuit Judge Sanborn very fully discusses the distinction between assumption of risk and contributory negligence. On page 502 he says:

"The truth is, that while assumption of risk and contributory negligence both apply to prevent a recovery in cases in which the servant has knowingly and willingly exposed himself to dangers too imminent for prudent persons to incur, they are neither identical in effect nor coincident in extent, and the latter has no application and constitutes no defence in that great majority of cases in which assumption of risk is an impregnable bar to a recovery where prudent persons assume the obvious dangers of their employments which are neither imminent nor great. Assumption of risk is the voluntary contract of an ordinarily prudent servant to take the chances of the known or obvious dangers of his employment and to relieve his master of liability therefor. Contributory negligence is the causal action or omission of the servant without ordinary care of consequences. The one rests in contract, the other in tort. Contributory negligence is no element or attribute of assumption of risk. The latter does not prevail because the servant was or was not negligent in making his contract

and in exposing himself to the defect and danger which injured him, but because he voluntarily agreed to take the risk of them. No right of action in his favor in such a case can arise against the master, because the latter violates no duty in failing to protect the servant against risks and dangers which the latter has voluntarily agreed to assume and to hold the former harmless from.

"This clear distinction between assumption of risk and contributory negligence has been repeatedly announced and constantly maintained in the federal courts and in most of the courts of the States. The law upon this subject which controls this case and all cases of this character in the federal courts is stated in *Washington, etc., R. R. Co.* v. *McDade,* 135 U. S., 554, 570, 10 Sup. Ct, 1044, 34 L. Ed., *235,* in the quotation which follows, and so far as our investigation has extended, the rules of law thus announced have never been disregarded or modified by that court in any subsequent decision:

" 'Neither individuals nor corporations are bound, as employers, to insure the absolute safety of the machinery or mechanical appliances which they provide for the use of their employees. Nor are they bound to supply the best and safest or newest of those appliances, for the purpose of securing the safety of those who are thus employed. They are, however, bound to use all reasonable care and prudence for the safety of those in their service, by providing them with machinery reasonably safe and suitable for the use of the latter. If the employer or master fails in this duty of precaution and care, he is responsible for any injury which may happen through a defect of machinery which was, or ought to have been known to him, and was unknown to the employee or servant. But if the employee knew of the defect in the machinery from which the injury happened, and yet remained in the service and continued to use the machinery without giving any notice thereof to the employer, he must be deemed to have assumed the risk of all danger reasonably to be apprehended from such use, and is entitled to no recovery. And further, if the employee himself has been wanting in such reasonable care and prudence as would have prevented the happening of the accident, he is

guilty of contributory negligence, and the employer is thereby absolved from responsibility for the injury, although it was occasioned by the defect of the machinery, through the negligence of the employer.'

"Here the two defences of assumption of risk and contributory negligence are separately stated and the first failed because the servant 'did not know that the belt in which he was caught had been recently and perhaps imperfectly repaired,' and 'was wholly unaware of the danger attendant upon putting on the belt by hand,' while the defence of contributory negligence failed because the defendant failed to satisfy the jury that the servant was not exercising ordinary care in placing the belt upon the pulley."

Again on page 505 he says:

"The unavoidable logical deduction from the principles and decisions to which we have adverted is that assumption of risk and contributory negligence are distinct and independent defences, that the former rests in contract and upon the maxim, *Volenti non fit injuria,* and is not conditioned or limited by the probability or improbability, the imminence or the remoteness, of the danger from the risk assumed, or by the existence or by the absence of contributory or other negligence on the part of the party who undertakes to assume the risk, while contributory negligence is founded upon an absence of ordinary care which causes or contributes to the injury which is the basis of the suit. This conclusion is fortified by the numberless decisions in which the defence of assumption of risk has been sustained in which the plaintiffs were not guilty of contributory negligence, cases in which prudent persons in the exercise of ordinary care would have assumed and ordinarily did assume the very risks which were the subjects of the actions."

In *Hesse* v. *R. R. Co.*, 58 Ohio St., 167, the Supreme Court said:

"Acquiescence with knowledge, is not synonymous with contributory negligence. One having full knowledge of de-

fects in machinery with which he is employed may yet use the utmost care to avert the dangers which they threaten."

In *Miner* v. *Railroad Co.*, 153 Mass., 398, the distinction was recognized in holding that where a plaintiff was guilty of no contributory negligence, nevertheless he might be barred from a recovery by assumption of the risk.

In *Cleveland, C. C. & St. L. Ry. Co.* v *Baker,* (C. C. A., 7th Circuit), 91 Fed. Rep., 224, the distinction is sharply drawn and flatly recognized.

Since, then, "assumption of risk" and "contributory negligence" are separate and distinct matters, the provision in the Act of 1893 that no employee of a common carrier, who may be injured by any car in use contrary to the provisions requiring automatic couplers, shall be deemed to have assumed the risk occasioned thereby, can have no effect on the general principle of law that recovery by a plaintiff is precluded where his own negligence has proximately contributed to and, as in this case, caused his own injury. Not only is this the conclusion that must be drawn from the principles stated, but the courts, in many decisions, have held this to be the law. With the exception of two or three decisions by a divided Supreme Court of North Carolina, all the cases hold that where the plaintiff was contributorily negligent, he cannot recover even though the defendant was disregarding statutory requirements.

In *Winkler* vs. *Phila. & R. R. Co.,* 53 Atl. Rep., 90, this question was squarely presented to the Superior Court of Delaware. Winkler had been injured by coupling cars not automatically equipped, as required by the Act of Congress of 1893. Whether or not he had himself been negligent was a disputed question. The court held that if he had himself been negligent he could not recover, although the company had violated the Act of 1893 by not

having its cars equipped. Lore, C. J., delivering the opinion said:

"If at the time of the accident, the defendant was using such a coupler, which was prohibited by the Act of Congress, it was guilty of negligence per se; and, if the injuries complained of resulted from such unlawful use alone, then the defendant would be liable. The law manifestly contemplates that the car shall be so equipped that the coupling shall actually be made automatically, and, if not so equipped, the plaintiff did not assume the risk arising therefrom, even though he continued in the employment of the company after such unlawful use of the cars had come to his knowledge. If, however, in using such unlawful coupler, the plaintiff contributed to the accident by his own carelessness, he cannot recover, notwithstanding the fact that the coupling was unlawful. In such case he must take the consequences of his own contributory negligence." * * * * "It is the duty of the servant, as well as of the master, to exercise care and prudence in all cases commensurate with the risk or danger of the employment. Therefore, if the plaintiff contributed to the accident by his own negligence, he cannot recover. Where contributory negligence is relied on as a defence, however, the burden of proving such negligence is upon the defendant."

This case was affirmed in the Supreme Court of Delaware, June 19, 1903, 56 Atl. Rep. 112, Boyce, J, at the close of the opinion said:

"If at the time of the accident, the defendant was using such a coupler, which was prohibited by the Act of Congress, it was guilty of negligence per se; and, if the injuries complained of resulted from such unlawful use alone, then the defendant would be liable. The law manifestly contemplates that the car shall be so equipped that the coupling shall actually be made automatically, and, if not so equipped, the plaintiff did not assume the risk arising therefrom, even though he continued in the employment of the company after such unlawful use of the cars had come to his knowledge.

"We are of the opinion that the judgment of the court below should be affirmed."

In *Cleveland C. C. & St. L. Ry. Co.* v. *Baker,* (C. C. Appeals, 7th Circuit), 91 Fed. Rep., 224, a brakeman was injured by reason of the cars not being equipped with grab-irons as required in Section 4 of the Act of 1893. The Court held that if the brakeman was guilty of contributory negligence, he could not recover. On page 228, Circuit Judge Woods said:

"We are of opinion that this question is substantially the same as if the railroad companies voluntarily and without legislative requirement had been accustomed to use grab-irons, and cars without them were known to be defective, and correspondingly more dangerous to one attempting to couple or uncouple them. The meaning of the act is that, by remaining in his employment, the servant does not assume the risks generally incident to the absence of such irons, but not that in a particular case of voluntary action, with full knowledge of the situation, the character of the act is not to be determined according to all the facts and circumstances. The known absence of the grab-irons was a circumstance in this case which the jury should have been directed to consider in determining whether the defendant in error was guilty of contributory negligence, or intended to assume the risk of the attempt to uncouple. A contrary construction of the act would permit a brakeman to take the risk of coupling or uncoupling cars not supplied with hand holds under circumstances of extreme and well understood danger, with the conscious purpose of holding the company for the result."

This precise question is clearly decided in *Denver & R. G. R. Co.* v. *Arrighi,* 129 Fed. Rep., 347, (C. C. A., 8th Circuit). Arrighi had his hand smashed in coupling cars engaged in interstate commerce, which cars were not provided with automatic couplers as required by the Act of 1893. He did not deny his contributory negligence, and

rested his whole case on the failure of the railroad company to provide automatic couplers. Circuit Judge Hook, delivering the opinion, said (p. 347):

"The trial court denied a request of the defendant that the jury be instructed to return a verdict in its favor for the reason that the plaintiff was guilty of negligence contributing to his injury. The action of the Court in that respect is assigned as error. Prior to the time when the Act of Congress became fully operative, the employees of a railroad company subject to its provisions, engaged in coupling cars used in moving interstate traffic, but not equipped with automatic couplers, assumed the ordinary risks and hazards of that employment, and the company was not liable to them for injuries resulting therefrom. The common law doctrine of assumption of risk was then applicable. But a new rule is prescribed by the act. It specifically provides that the employees shall no longer rest under the burden of that assumption in respect of any car used contrary to its provisions. While this is true, the railroad company is not thereby deprived of the defence of contributory negligence. With an exception, unnecessary to be noted here, the risks and dangers of an employment which at common law are assumed by the employee are not those which arise from the negligence of either party. And when the burden of those assumed risks and dangers were lifted from the employee by statutory enactment, and cast upon the railroad company, there was not transferred therewith a responsibility for the negligence of the employee himself. The rationale of the doctrine of assumption of risk, is not that which supports the rule of contributory negligence. They operate differently and are dependent upon widely different principles. It cannot be assumed that by the passage of a salutary law designed for the protection of those engaged in hazardous occupation Congress intended to offer a premium for carelessness, or to grant immunity from the consequences of negligence. The reasonable conclusion is that the defence of contributory negligence is as available to a railroad company after as before the passage of the act of Congress, although it has not complied with its requirements."

The Act of March 23, 1888, (85 Ohio Laws, p. 105), required every railroad company to adjust, fill or block the frogs, switches, and guard rails on its tracks, and provided a penalty for failure so to do. The Cleveland, C. C. & St. L. Ry. Co., did not comply with the provisions of the statute, and as a result of such failure Marramore was injured. In his suit, he relied on the failure of the railroad company to comply with the statute. The case is reported in 96 Fed. Rep. 298, (C. C. of Ap., 6th Circuit). Circuit Judge Taft, delivering the opinion, said (p. 304):

"Assumption of risk and contributory negligence approximate where the danger is so obvious and imminent that no ordinarily prudent man would assume the risk of injury therefrom. But where the danger, though present and appreciated, is one which many men are in the habit of assuming, and which prudent men who must earn a living are willing to assume for extra compensation, one who assumes the risk cannot be said to be guilty of contributory negligence if, having in view the risk of danger assumed, he uses care reasonably commensurate with the risk to avoid injurious consequences. One who does not use such care, and who, by reason thereof, suffers injury, is guilty of contributory negligence, and cannot recover, because he, and not the master, causes the injury, or because they jointly cause it. Many authorities hold that contributory negligence is a defence to an action founded on a violation of statutory duty, and this undoubtedly is the proper view. Such is the case of Krause v. Morgan, 53 Ohio St. 26, 40 N. E. R. 886, where the employee, in spite of a warning from his superior, and in the face of the most palpable danger, exposed himself to certain injury, and then sought to hold his employer liable because he had not employed the statutory methods of protecting him from danger. In Railway Co. v. Craig, 19 C. C. A. 631, 73 Fed. Rep. 642, we held that the Krause Case was one of contributory negligence, and followed it as such. The syllabus confuses the difference between the assumption of risk and contributory negligence, but the syllabus and opinion are, of course, to be restrained to the facts. The fol-

lowing cases, relied on by counsel for the railway company, were also cases of contributory negligence in suits for violation of specific statutory duty: Coal Co. v. Estievenard, 53 Ohio St., 43; Coal Co. v. Muir, 20 Col. 320; Holum v. Railway Co., 80 Wis. 299; Grand v. Railroad Co., 83 Mich. 564; and Taylor v. Manufacturing Co., 143 Mass. 470. In the last two cases the distinction between contributory negligence and assumption of risk is clearly referred to.

"For the reasons given, we think the court below was in error in holding that the plaintiff assumed the risk of injury from the failure of the defendant company to comply with the statute passed for his protection, and that the case should have been submitted to the jury on the issue whether, assuming the unblocked guard rails and frogs as a condition of the situation, he used due care to avoid injury therefrom."

Lake Erie & W. Ry. Co. v. *Craig*, 73 Fed. Rep., 642, is another case based on a violation of the Ohio Statute (named in the preceding case), requiring frogs to be blocked. Circuit Judge Taft on page 643 says:

"The liability of the defendant railway company was asserted by the plaintiff on the ground that it had failed to block a railway frog in its yard at Lima, in violation of a statute of Ohio passed March 23, 1888 (85 Ohio Laws, 105), requiring all railway corporations operating railways in the state to block or fill such frogs, for the safety of their employees, and imposing a punishment for failure to do so. We have already held, in Railroad Co. v. Van Horne, 16 C. C. A. 182, 69 Fed. Rep. 139, that the effect of this statute is to make a failure by a railroad company to comply with it negligence, as a matter of law. This is the ruling of the supreme court of Ohio in construing an analogous statute enacted to compel mine owners to adopt safety appliances for their employees. Krause v. Morgan (Ohio Sup.), 40 N. E. 886. The statute does not, however, prevent the master, in such cases, from escaping liability, if the employee injured by the master's non-compliance with the

statute is himself guilty of contributory negligence. This is expressly ruled by the supreme court of Ohio in the case cited, where, after an elaborate review of the authorities in other states, Judge Speer, speaking for the court, sums up its conclusions as follows:

" 'While the statute, as we construe it, does not make the operator of the mine absolutely liable to a party injured by an explosion of gas, where the operator has not complied with the statute, such conduct is negligence per se, and the employer cannot escape liability by showing that he took other means to protect the workmen, equally efficacious. Proof of failure to obey the statute is all that is necessary to establish negligence on the part of the operator, but the statute does not change the well-established rule that, where one has been guilty of negligence that may result in injury to others, still the others are bound to exercise ordinary care to avoid injury.' "

In *Hodges* v. *Kimball;* 104 Fed. Rep., 745, handholds or grab-irons were not provided as required by Section 4 of the Act of Congress of 1893. It was held that this neglect of statutory duty did not preclude the defence of contributory negligence. On page 752, District Judge Purnell said:

"The absence of the handholds or grab-irons does not appear in any sense to have been the proximate cause of the injury. The evidence is that these irons were missing from the opposite side of the car from which decedent entered If they had been on the car on that side, they could not have aided him. The Act of Congress, which is not referred to in either brief or invoked by the plaintiff, requires railroads doing interstate commerce to provide handholds or grab-irons in the ends and sides of freight cars (27 Stat. 531), but a failure to provide such grab-irons does not excuse a brakeman from a failure to use ordinary prudence in a particular case, where he observes the absence of such appliances; nor does this act change the rule as to the liability of the master where the failure to comply with the statute was not the cause of the injury."

In *Dixon* v. *Western Union Tel Co.*, 68 Fed. Rep., 630, the law is thus stated in paragraph 3 of the syllabus:

"The statute of Indiana (Act March 4, 1893) providing that 'every * * * corporation * * * shall be liable in damages for personal injury suffered by an employee while in its service * * * where such injury resulted from the act or omission of any person done or made in obedience to any rule, regulation or by-law of such corporationfi or in obedience to the particular instructions given by any person delegated with the authority of the corporation, * * *' does not impose liability upon the employer for injuries resulting from the act or omission of the person injured."

That a violation of statutory duty does not preclude the defence of contributory negligence, is held by the Supreme Court of Vermont, in *Kilpatrick* v. *Grand Trunk Rwy. Co.*, 27 Am. & Eng. R. R. Cases, annotated, 945. A ladder was maintained on the side of a car contrary to statute, and a switchman while using it was knocked off. On page 952, Stafford, J., said:

"Yet it does not follow that an employee who is injured by reason of the neglect of his employer to comply with the statute, can recover under all circumstances. By the language of the statute, the right to recover is limited to injuries 'resulting from such neglect;' and, as this court has once decided in this very case, that means resulting from such neglect alone; and the plaintiff must, as in other actions of this character, show that his own negligence did not contribute to the injury. But the doctrine of contributory negligence is entirely separate and distinct in theory from the doctrine of assumption of risk, although, as a practical matter, the fact that the employee knew and appreciated the risk he was running may, in the circumstances, justify or even require a finding that he was guilty of contributory negligence; or the negligence may consist entirely in the manner in which the risk is met. To speak concretely, take this very case, the use of a side ladder. They had been

used by employees for years, and doubtless by such use the risk had been assumed. Now, by reason of the statute, the risk is not, and cannot be assumed. Yet the use of it, under the given circumstances, may be negligence, and may even be so gross as to be negligence as matter of law. The defendant here claimed that the plaintiff was guilty of contributory negligence as matter of law, and based the claim mainly upon the ground that the plaintiff knew the location of the post and the track, their nearness to each other, and the consequent danger to one riding by the post on a side ladder. The plaintiff admitted that he knew the location of the post and the rail in a general way, but denied that he knew the distance between the two, and testified that before the accident he did not know of any reason why one could not ride safely by the post on a side ladder; that he had never tried it or seen it tried, although he had ridden safely past other posts in the yard * * * Upon this testimony we are asked to say as matter of law that the plaintiff was guilty of contributory negligence. We think it was a question for the jury."

The above case was before the Supreme Court of Vermont twice, the first case being reported in 20 Am. & Eng. R. R. Cases, annotated, 300. The law as stated there in the syllabus is,—

"That an instruction that the question of contributory negligence was not in the case was erroneous, since defendant's neglect to perform its statutory duty did not relieve plaintiff from proving that his own negligence did not contribute to his injuries."

In *Mobile J. & K. C. R. Co.* v. *Bromberg,* 37 Am. & Eng. R. Cases, annotated, 823, (Supreme Court of Alabama), a brakeman was injured coupling cars not provided with automatic couplers. The tenor of the whole case shows that contributory negligence, if established, is considered a good defence.

In *Hollum* v. *Chicago, Milwaukee & St. Paul Rwy. Co.,*

80 Wis., 299, the law is thus stated in paragraph 2 of the syllabus:

"Ch. 123, Laws of 1889, requiring every railroad company to erect and maintain guards or blocks at every frog, and providing that the company shall be liable for all damages sustained by reason of its failure to do so, whether the person injured be an agent or servant of the company or not, and notwithstanding such failure may occur through the negligence of any other agent or servant thereof, does not take away the defence of contributory negligence."

In *Victor Coal Co.* v. *Muir,* 20 Col., 320, a statute required mine owners to securely prop dangerous places in mines. The mine owners neglected to do so, and Muir continued to work in what he must have known was an exceedingly dangerous place. He was injured by falling rock, and sued for damages. It was held that though the company violated the statute in not propping at this particular place, yet the plaintiff's continuing to work in the place, with the loose rock in full view, was such contributory negligence as to bar him from a recovery.

A statute of Massachusetts requires all openings of elevators and well holes upon every floor of a factory to be protected in a manner specified, and that any corporation shall be liable for all damages suffered by any employee by reason of a violation of the statute. In *Taylor* v. *Carew Manufacturing Company,* 143 Mass., 470, it was held that notwithstanding the failure of the company to provide guards according to the statute, the plaintiff having been negligent, he could not recover.

A Michigan statute requires railroad companies to adjust, fill, or block the frogs, switches, and guard rails on their roads in such manner as to prevent the feet of employees from being caught therein. In *Grant* v. *Mich. Cen.*

R. R. Co., 83 Mich., 564, the law is thus stated in paragraph 3 of the syllabus:

"The failure of a railroad company to comply with the provisions of said act will render it liable to an employee who is thereby injured, in a case where the law applies, *if he is not himself guilty of negligence.*"

A statute of Mississippi requires that railroad trains shall not run at a greater speed than six miles per hour through towns and cities, and provides, further, that the company shall be liable for any damages or injury which may be sustained by any one from trains while running at a greater speed than six miles.

In *Vicksburg & Meridian R. R. Co.* vs. *McGowan*, 62 Miss. 682, a case in which an injured party was trying to recover damages because the train which injured him was running more than six miles an hour, while in a town, the Supreme Court, Campbell, C. J., delivering the opinion, said on page 694:

"We hold the law to be that, even where a railroad company violates the statute under consideration, one who could by the exercise of ordinary care avoid injury from the act of the company cannot recover for such injury.

"There is in the books much confusion on the subject of contributory negligence. The principle on which the doctrine rests is that the plaintiff cannot recover for the negligence of another if, by ordinary care, he could have avoided injury from such negligence. Contributory negligence is the want of ordinary care to avoid injury from the act of another. One must use due diligence or ordinary care to avoid injury from another, failing in which he may not recover for what by such diligence or care he might have avoided. Whether in any case the plaintiff used the requisite care to avoid injury depends on the circumstances in which he was called on to act.

"One who contributes directly to his own injury, by a failure to exercise the ordinary care which would have saved

him from harm from the negligence of another, is denied the right to recover, because the law will not undertake to apportion the blame between parties mutually in fault.

"In this case the plaintiff was on the track of the defendant when he was struck by a locomotive and injured. Although he may have been improperly on the track where he was, and although the defendant may have been a wrongdoer by violating the statute as to the rate of speed, the plaintiff is not entitled to recover, if notwithstanding the wrong of the defendant, he could by ordinary care have avoided injury from the act of the defendant."

In *Mobile & Ohio R. R. Co.* vs. *Stroud,* 64 Miss. 784, in a similar case, Mr. Justice Arnold, on page 792, said:

"A man who voluntarily gets on a railroad track, sixty feet in front of a train moving toward him at a greater rate of speed than six miles an hour, at a point where there is nothing to obstruct the view or prevent him from seeing the train or leaving the track after he is on it, must take the consequences of his own negligence and folly. If injured by the train, under such circumstances, he is not more sinned against than sinning. He does not exercise reasonable or ordinary care. He cannot speculate or experiment, in such manner, with safety, on the chances of others being more prudent than himself, or of others taking better care of him than he does himself. The negligence of the railroad company in running its train at an unlawful rate of speed, was no excuse for the negligence of the deceased.

"It was decided in V. & M. R. R. Co. v. McGowan, 62 Miss. 682, that section 1047 of the code, which prohibits locomotives and cars from being run through towns, cities, and villages, at a greater rate of speed than six miles an hour, does not impose absolute liability on a railroad company for an injury done while the statute is being violated, without regard to the conduct of the person injured or the circumstances under which the injury occurred, and that even where a railroad company violates the statute, one who could by the exercise of ordinary care avoid injury by the act of the company, cannot recover for such injury."

In *Railroad Co.* vs. *Brooks*, 85 Miss., 269, in another similar case, Mr. Justice Trully, on page 274, said:

"That the employees of appellant were guilty of negligence is manifest. To run an extra freight train, at an unusual time, through a thickly settled part of a town, at a rapid rate of speed, in the night time, over frequented street crossings, and without giving any signal or ringing any bell, must assuredly be deemed negligence. The appellee did not insist, nor did the court instruct, that such acts on the part of the railroad employees was gross negligence, but allowed the jury to pass on the question of whether the conduct of Brooks, the injured party, as disclosed by the testimony, was such as to constitute, under the circumstances of this case, contributory negligence. Manifestly, appellant has no ground of complaint on this score. It is contended that the facts of the case show beyond dispute that Brooks, the person injured, was guilty of such recklessness as to preclude recovery by appellee. But the conduct of Brooks at the time of the injury was of itself a controverted fact, and this and all other controverted facts must be submitted to the jury. This was done by the trial judge, and their determination was adverse to the contention of appellant. The jury, upon disputed facts, guided by fair and accurate instructions, having found that the negligence of appellant was the proximate cause of the injury, and there being some testimony to sustain that finding, we must decline on this ground to reverse the judgment, even though it may be granted that the question was one of doubt."

Section 193 of the Constitution of 1890, of Mississippi, provides that knowledge by employees of the defective or dangerous condition of machinery or appliances shall not be a defense, to a railroad company in any action for injuries caused thereby. It was held in *Buckner* vs. *Railroad Co.*, 72 Miss., 873, that this did not preclude the defense of contributory negligence. On page 877 Mr. Justice Campbell said:

"The averment of the declaration that the hand-car furnished him by his employer was defective in having a lever that made its operation dangerous to persons on it, and a broken wheel which led to serious consequences, and that these defects were the direct and immediate cause of the injury to the plaintiff, of which he complains, makes it sufficient to withstand a demurrer, although the declaration does not negative contributory negligence by the plaintiff, the rule in this State being that this defense is to be made by the defendant, unless it arises out of the case made by the plaintiff.

"The declaration shows that the plaintiff had knowledge of the defects in the hand-car, but the constitution of 1890 declares that knowledge by an employee of the defective or unsafe character or condition of any machinery shall be no defense, etc., section 193. The effect of this is not to destroy the defense of contributory negligence by a railroad company, but merely to abrogate the previously existing rule that knowledge by an employee of the defective or unsafe character or condition of the machinery, ways or appliances, shall not, of itself bar a recovery. The law was that knowledge by an employee of defective appliances which he voluntarily used, precluded his recovery for an injury thus received. The Constitution destroys that rule, and the mere fact that the employee knew of the defect, is not a bar to recovery; but knowledge by an employee of defects is still an element or factor, and a very important one, in determining whether, with the knowledge he had, he used that degree of caution required in his situation with reference to the appliances causing his injury. The Constitution did not have the effect to free employees of railroad companies from the exercise of ordinary caution and prudence. It does not license recklessness or carelessness by them, and give them a claim to compensation for injuries thus suffered. They, like others not employees, must not be guilty of contributory negligence, if they would secure a right of action for injuries. The fact of knowledge of defects shall not be, as heretofore, a defense, but the same rule that applies to others applies to them. They must use the degree of caution applicable to the situation, for the absence of this is negligence, and, if it contributed to the injury, no recovery

can be had by an employee any more than by one not an employee."

THE INTERSTATE COMMERCE COMMISSION CORRECTLY INTERPRETING THE ACT OF 1893, NOTIFIED THE RAILWAY EMPLOYEES THAT SECTION 8 WOULD NOT RELEASE THEM FROM RESPONSIBILITY FOR THEIR OWN CONTRIBUTORY NEGLIGENCE.

That the construction placed upon the Act of 1893 by the Interstate Commerce Commission is in harmony with the principles laid down in the above cited cases is manifest from the following paragraph copied from page 84 of the printed copy of its Fourteenth Annual Report, dated December 24, 1900, and signed by every member of the Commission, viz:

"It may well be repeated that a large number of the accidents to employees can only be attributed to carelessness.

"Impressed with the necessity of particularly directing the attention of the employees to this subject, the secretary of the Commission addressed a letter to the subordinate branches of various railway organizations calling attention, among other matters, to the necessity of greater care and caution on the part of railway employees in the discharge of their duties. It was also stated to be the understanding of the Commission that Section 8 of the act does not fully release them from responsibility for contributory negligence."

THE DOCTRINE OF CONTRIBUTORY NEGLIGENCE WAS CORRECTLY APPLIED BY THE PENNSYLVANIA COURTS IN THIS CASE.

The ruling of the Pennsylvania courts upon the question of contributory negligence is not reviewable here, it not presenting a Federal question. In any event, it is in entire harmony with the rulings of this and all other courts.

In *Wash. & Georgetown R. R. Co.* vs. *McDade,* 135 U. S., 554, this court held, as appears from the syllabus, that—

"When a person employed by another to labor in connection with machinery, is wanting in such reasonable care and prudence as would have prevented the happening of an accident and is injured by the machinery, he is guilty of contributory negligence, and his employer is thereby absolved from responsibility for the injury, although it was occasioned by defect in the machinery and through the negligence of the employer."

In *Southern Pac. Co.* vs. *Seley,* 152 U. S., 145, this court held, as appears from the syllabus, that—

"After serving as a brakeman in the employ of a railroad company, S. became a conductor on the same railroad, and as such had been engaged at a depot yard at one of its stations at least once a week, and usually oftener, for seven years. While making up his train at that yard, preparatory to running out with it, after the chief brakeman had failed in an attempt to make a coupling he tried to make it. There was an unblocked frog at the switch where the car was. He put his foot into this frog, and was told by the brakeman that he would be caught if he left it there. He took it out, but put it in again, and, being unable to extricate it when the cars came together, he was thrown down and killed. In an action brought by his administratrix against the railroad company to recover damages, *held,* that S. must be assumed to have entered and continued in the employ of the railroad company with full knowledge of any danger which might arise from the use of unblocked frogs; that he was guilty of contributory negligence; and that the company was entitled to a peremptory instruction in its favor."

In the case at bar Schlemmer at first obeyed the instruction to keep his head down, but afterwards raised it into a position of danger, and thus brought on his own death. Moreover, he violated absolutely a rule of the company which required him to use a stick in making the coupling.

In the testimony of plaintiff's first witness this passage appears (Record, p. 23):

"Q. Two men with a stick extending through between the cars could have lifted that bar up, and inserted the pin?
"A. Yes, sir, they could.
"Q. And you say there was a rule of the road requiring men to do that?
"A. Yes, sir.
"Q. Schlemmer knew that?
"A. Yes, sir; they all knew it.
"Q. And they all disobey it, too, pretty generally?
"A. You hardly ever see anybody with a stick."

Under the Act of Congress of 1893 the absence of automatic couplers does not make the company liable *per se* for damages to the injured party. It subjects the company to fine under the 6th section and the 8th section takes away the defence of the employee's assumption of risk, if the act has been violated. Beyond this the question of damages is determined by the rules and principles of law precisely as they existed prior to the passage of that Act. It does not permit an employee to recover damages for an injury which, as in this case, his obedience of orders would have rendered impossible.

The Steam Shovel was not a "Car Used in Moving Interstate Traffic."

The Act of 1893, in its 4th section, makes it unlawful for a railroad company "to haul, or permit to be hauled, or used upon its lines *any car used in moving interstate traffic* not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

The supplementary Act of March 2, 1903, (37 Stat. L. 943), declares that "the provisions and requirements hereof and of said acts relating to train brakes, automatic couplers, grab irons and draw bars shall be held to apply to all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce."

The accident which resulted in the death of plaintiff's decedent occurred before the Act of 1903 was passed, and, as is conceded, only five days after the date on which the Act of 1893 had gone into effect under extensions granted by the Interstate Commerce Commission, pursuant to authority contained in the 7th section of the act.

The Act of 1903 is, however, evidence that Congress did not understand the Act of 1893 to apply to every kind of vehicle that may be used on a railroad. Otherwise it would not have been deemed necessary to extend and amplify its terms and apply its provisions not only "to any car used in moving interstate traffic," but also to "all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce."

The question is not whether the steam shovel in question comes under the designation of "similar vehicles used on any railroad engaged in interstate commerce," under the Act of 1903, but whether it was a *"car used in moving interstate traffic,"* within the intendment of the Act of 1893.

The language of a statute is always construed in accordance with common parlance. In common parlance the machine in question is never spoken of as a car at all, but always as a "shovel" or a "steam shovel." Throughout this case plaintiff's counsel have been very careful to designate it as a "steam shovel *car*." It never was so designated or spoken of by anybody else either in the record of this case or anywhere else. Twenty-eight times the witnesses, railroad men, have designated it as a "steam shovel" (Record, pp. 15-

20-21-22-25-33-36-37-39-43-46-49). Never once did any of them designate it as anything else, except when the words were put into their mouths by plaintiff's counsel. Such a machine is not known to the trade or to the railroad fraternity as a "steam shovel car" any more than a mowing machine is known as a "mowing machine wagon," or a reaper as a "reaper wagon" or "reaper car."

The following occurs in the testimony of Yard Conductor Coates, who was plaintiff's first witness (Record, p. 21):

"Q. This steam shovel you speak of is a mere machine used in excavating?
"A. Yes, sir.
"Q. A machine on wheels; it is not a car at all, as I understand it. It was merely a machine used in excavating, on wheels. Is that right, Mr. Coates?
"A. Yes, sir, that is right."

In the testimony of witness Nielson, a freight conductor, the following occurs (p. 39):

"Q. What was on the rear of your train?
"A. The steam shovel.
"Q. Will you describe that steam shovel to the court and jury?
"A. Well, it was an ordinary steam shovel, is about all I know about it.
"Q. A truck under it?
"A. Yes, sir.
"Q. And was used for what purpose?
"A. Used for contractors at the time.
"Q. In making railroad?
"A. Railroad building.
"Q. To shovel dirt?
"A. Yes, sir.
"Q. A big shovel operated by steam?
"A Yes, sir."

It was used "'in the construction of railways" and belonged to the "Construction Company" (pp. 50-51).

Just as a mowing machine or a reaper requires wheels to enable it to get at the hay or the grain that is to be cut, so a steam shovel requires wheels to admit of its approach to a bank of earth which is to be shoveled. Three of these machines, each one marked "Marion Shovel, Model No. 60," are, or were on the 15th of November, 1906, at work in a long and deep cut between Washington and Alexandria. They contain powerful machinery by which a huge shovel is by the power of steam drawn, or forced, into a bank of earth, taking up a ton or more at a single dip. It is then swung by a heavy crane out over an empty dirt car. By the pressure of a button, or touch of a lever, the bottom of the shovel gives way and its contents drop into the car. Two shovelfuls, taken out in two minutes, fill a car. As the work progresses additional rails are laid so that the shovel may, by the assistance of its wheels, reach its work precisely as the mowing machine, by means of its wheels, reaches the grass it is to cut. A steam shovel is no more a car than a mowing machine is a wagon. But if it could be deemed a car at all, it is certainly not one "used in moving interstate traffic." It is not used in moving traffic at all, but in shoveling dirt, making the excavations necessary in the construction of a railroad.

This particular steam shovel, instead of being used in moving interstate traffic, or any kind of traffic, was itself the subject of transportation by the defendant company. It did not belong to the railroad company. Plaintiff's statement (Record, p. 4) charges that "defendant was transporting said shovel car from Limestone, in the State of New York, through the State of Pennsylvania." It was being transported for the construction company which owned it. Instead of using it in moving traffic, the railroad company was transporting it as an article of traffic and receiving pay for its transportation. Such a steam shovel is very heavy.

It could not safely be loaded into, or onto, any ordinary freight car. It was therefore easier and safer to hitch it to the rear end of a freight train. But it was nevertheless an object of transportation—an article of freight traffic—and not something used in moving traffic.

Suppose, instead of a steam shovel, it had been a mowing machine, offered for transportation, and its wheels having been found to fit the rails, it had been attached to the rear of the train, would it thereby have become a "car used in moving interstate traffic?"

Whether or not such a steam shovel can be deemed within the provisions of the statute of 1903, covering all "cars and similar vehicles used on any railroad engaged in interstate traffic," it seems plain that it was not "a car used in moving interstate traffic," within the terms and intendment of the Act of 1893.

Furthermore, there is no satisfactory or conclusive evidence that the steam shovel itself was in course of transportation from a point in one state to a point in another. The testimony shows that it was being taken from DuBois to Punxsutawney (Record, pp. 15, 28, 32, 33, 39).

"I do not remember where it came from. We was to take it from DuBois to Punxsutawney" (Record, p. 43).

Those points are both within the State of Pennsylvania. The only witness that testified about any other point was Mr. McCray, who said:

"I learned from railroad men that it was coming from Limestone. * * * * * This I know from hearsay" (Record, p. 50).

It is conceded that the Act of 1893 did not go into effect until August 1, 1900, extensions having been granted by the Interstate Commerce Commission under the 7th sec-

tion. If this steam shovel did come from Limestone at all, there is no evidence whether it was taken upon the defendant's railroad before, or after August 1, 1900.

In conclusion, defendant in error respectfully submits that the writ of error in this case should be dismissed, and the judgment of the Supreme Court of Pennsylvania affirmed, for the following reasons:

1. No Federal question was submitted to, or passed upon by, the Supreme Court of Pennsylvania.

2. Even had a Federal question been raised by the record in the Supreme Court of Pennsylvania, its decision would not have been necessary, in view of the ruling upon the question of contributory negligence.

3. The decision of the State courts on the question of contributory negligence is not reviewable here.

4. The Act of Congress of 1893 does not deprive a common carrier of the defence of contributory negligence, but relates only to the defence of assumption of risk.

5. In any event, the steam shovel in question was not "a car used in moving interstate traffic," but was itself being moved as traffic, although whether as interstate traffic, does not clearly appear, from the evidence.

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